

BEFORE THE
Federal Communications Commission

WASHINGTON, D. C.

ORIGINAL

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DEC 19 1991

In the Matter of

Review of the Policy Implications
of the Changing Video Marketplace

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91-221
MM Docket No. 91-221

Federal Communications Commission
Office of the Secretary

ORIGINAL
FILE

To: The Commission

REPLY COMMENTS OF FOX BROADCASTING COMPANY

Fox Broadcasting Company ("Fox"), submits these Reply Comments in the above-captioned matter. See Notice of Inquiry, 6 FCC Rcd 4961 (1991) (the "Notice").

I. INTRODUCTION

More than three dozen parties filed comments in response to the Commission's Notice. Predictably, given the open-ended nature of the Inquiry, commenters expressed a wide range of viewpoints covering an equally wide range of issues. But the record makes clear that action is needed to bring Commission rules and policies in line with the competitive and technological realities of the video marketplace.

Fox will address only two issues in these brief reply comments. The first -- the necessity for changes in the current compulsory copyright license scheme -- while not strictly a matter of Commission regulation, is nevertheless critical to the future competitive structure of the video marketplace. The other -- the Commission's cross-interest policy -- seems to have been ignored by commenters, but must be

addressed if the Commission is to effectuate the changes, advocated by numerous parties, in the regulatory structure governing local and regional broadcast ownership.

II. THE CABLE COMPULSORY COPYRIGHT LICENSE HAMPERS THE ABILITY OF BROADCASTERS TO COMPETE AND SHOULD BE REPEALED

Among the issues raised in the Notice is whether "repeal of the compulsory license for cable television and/or implementation of a scheme of transmission consent [would] enable local stations to compete more effectively?" 6 FCC Rcd at 4963 (¶ 10). It is more than a little ironic that in their initial comments, both the National Association of Broadcasters and the National Cable Television Association support retention of the cable compulsory copyright license. Fox respectfully disagrees.

Fox notes at the outset that the Commission previously has reviewed the issue of the cable compulsory copyright license and recommended to Congress that it be abolished. Compulsory Copyright License for Cable Retransmission, 4 FCC Rcd 6562 (1989). The same factors that gave rise to that conclusion now compel its reaffirmation.

The affirmative case for repealing the compulsory license is easy to state. First, the compulsory copyright license was established to provide the then infant cable industry with access to programming. This clearly is no longer

a valid concern given the proliferation of cable programming sources. Second, as currently structured, the compulsory license invidiously discriminates between mature stations, whose cable carriage patterns were established prior to 1972, and newer stations that have signed on since that date. Third, the perceived transactional difficulty envisioned in 1976 relative to cable performance rights has long since evaporated. Today, cable operators freely contract -- without government assistance -- with dozens of satellite delivered cable networks. These networks operate as rights clearing intermediaries for the programs they telecast. Plainly, broadcasters could perform that same rights clearing function today.

Moreover, by empowering local broadcasters to function as rights clearing intermediaries, Congress could foster the development of much needed dual revenue streams for local broadcasters. Significantly, these additional revenue streams would arise out of free market transactions made possible by a de-regulatory action.

It is clear that the emergence of new distribution technologies such as MMDS and DBS, and recent court decisions, will combine to compel Congress either to adopt additional compulsory licenses or to initiate a transition back to a free market environment. The satellite license in Section 119 of the Copyright Act is slated to "sunset" in 1994. MMDS is not

currently covered by any license. Thus, the status quo in which cable enjoys a license while its competitors do not, is not a stable long-term situation.

The only logical and appropriate policy response is for the government to extricate itself from the television copyright marketplace. So long as government licensing continues in place, program owners and exhibitors will be unable to effectuate contracts for exclusive exhibition rights and/or exclusive exhibition windows. Yet it is clear that such exclusive rights/windows will be a principal means by which different television exhibitors seek to distinguish their services and to compete in the increasingly competitive television marketplace.

Significantly, substantial segments of the cable industry itself understand the need to phase out compulsory licensing. Attached to these comments is a letter dated October 30, 1991 from Dr. John C. Malone, President, Chief Executive Officer of Tele-Communications Inc., affirming his company's recognition of the inevitability of compulsory license repeal.

III. ANY RELAXATION OR REPEAL OF THE BROADCAST MULTIPLE
 AND CROSS-OWNERSHIP RULES MUST BE ACCOMPANIED BY
 THE ELIMINATION OF THE CROSS-INTEREST POLICY

Numerous parties responded to the Commission's request for comments on the implications of increasing competition in

the video marketplace for the broadcast multiple ownership and cross-ownership rules. See Notice at 4962 (¶ 5). Although commenters addressed the issue with varying degrees of specificity, a majority generally favored relaxation or repeal of broadcast ownership restrictions. Several commenters observed that the one-to-a-market and duopoly rules (see 47 C.F.R. § 73.3555(a) and (b)), in particular, prevent broadcasters from entering into potentially beneficial ownership and operating arrangements on the local and regional levels. 1/

Yet none of the parties advocating modification of the broadcast ownership restrictions addressed the continuing impact on local and regional ownership and operating issues of the Commission's cross-interest policy, which operates independent of, and as a supplement to, the rules. 2/

1/ See, e.g., Comments of Group W at 8-13 (broadcasters should be permitted "to recognize economies of operation" on local and regional levels); Comments of INTV at 24-28 (broadcasters' competitive position and public interest contributions would be enhanced by "combination of studio facilities, cross-utilization of skilled employees, and the ability to sell advertising on more than one channel"); Comments of NAB at 31-35 ("efficiencies afforded by joint operations" would enable broadcasters "to shore up marginal operations in an increasingly competitive environment").

2/ The cross-interest policy addresses "instances in which an individual or entity has a 'meaningful' relationship in two

[Footnote continued]

Significantly, although both the scope and the applicability of the cross-interest policy were substantially reduced in 1989, ^{3/} the Commission left in place and solicited further comments regarding the propriety of the policy's continued applicability to "key employees" and to nonattributable equity interests and joint ventures. See Further Notice, supra. In the nearly three years following release of the Further Notice, however, the Commission has taken no further action in its cross-interest proceeding, which remains pending.

Thus, even if the broadcast ownership restrictions were modified, as requested by numerous commenters, continued application of the Commission's cross-interest policy would deter broadcasters from entering into innovative local and

^{2/} [Footnote continued]

competing media outlets serving substantially the same area." Policy Statement, Reexamination of the Cross-Interest Policy, 4 FCC Rcd 2208 (¶ 5) (1989); see also Notice of Inquiry, FCC 87-188 (released June 5, 1987) at ¶¶ 2-4 (policy developed "to examine relationships not proscribed by the Commission's early attribution rules, but which nevertheless raise competitiveness concerns").

^{3/} See Policy Statement, supra. The Commission concluded that several factors, "including changes in the mass media marketplace, modifications of the attribution rules, and the adequacy of other legal remedies" (id. at 2210-11 ¶ 20)), rendered the policy unnecessary and contrary to the public interest with respect to consulting positions, advertising agency representative relationships and time brokerage arrangements.

regional ownership and operating arrangements. Consequently, modification of the rules would not produce the beneficial results envisioned by commenters unless and until the Commission acts on the changes under consideration in its pending reevaluation of the policy. See Further Notice of Inquiry/Notice of Proposed Rule Making, Reexamination of the Commission's Cross-Interest Policy, 4 FCC Rcd 2035 (1989) (the "Further Notice").

If the Commission concludes that competitive developments justify the relaxation or repeal of local and regional restrictions on broadcast station ownership, the same developments clearly mandate the elimination of the remaining "key employee" and nonattributable interest/joint venture provisions of the cross-interest policy, which supplement those rules. ^{4/} Indeed, the principal issue raised by this Inquiry in connection with the broadcast ownership restrictions -- that is, whether the Commission's regulatory scheme for the video marketplace is appropriate in the face of significant market changes -- is virtually identical to that raised in the

^{4/} The Commission has already made clear by modification of its attribution guidelines that nonattributable equity interests do not rise to a level of concern sufficient to require regulatory intervention. See Ownership Attribution, 97 FCC2d 997, 1008-09, 1020-24 (1984).

Commission's reevaluation of the vestiges of the cross-interest policy. 5/

Ultimately, in order to effectuate any of the changes in the broadcast ownership rules under discussion in this Inquiry, the Commission must remove nonattributable equity interests and joint ventures, as well as the cross-utilization of key management personnel, from the coverage of the cross-interest policy.

Accordingly, any relaxation of the one-to-a-market or duopoly rules requires elimination of the remaining provisions of the cross-interest policy by concluding its pending proceeding in MM Docket No. 87-154, or, alternatively, by incorporating the record of that proceeding into the record of the present Inquiry.


5/ In the pending cross-interest proceeding, for example, the Commission has questioned whether the possibility of anticompetitive behavior by nonattributable investors or joint venture participants would be eliminated by "marketplace constraints" and "the competitive nature of local media markets." See Further Notice, 4 FCC Rcd at 2036-38 (¶¶ 12, 17). With respect to "key employees," the Commission has sought comment on whether "the public interest benefits derived by permitting marginal stations to resolve financial or programming difficulties through the use of experienced employees would be sufficient on balance to justify permitting such cross-interests." Id. at 2036 (¶ 9).

IV. CONCLUSION

Fox appreciates the Commission's attention, in this proceeding, to the linkages that exist between and among the various segments of, and participants in, the contemporary video marketplace. Fox is hopeful that the Commission will promptly take action to ensure that its television rules and policies remain "in step with current industry circumstances" as the industry enters the 21st century.

Respectfully submitted,

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BY 
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December 19, 1991

ATTACHMENT A

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TELE-COMMUNICATIONS, INC.

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October 30, 1991

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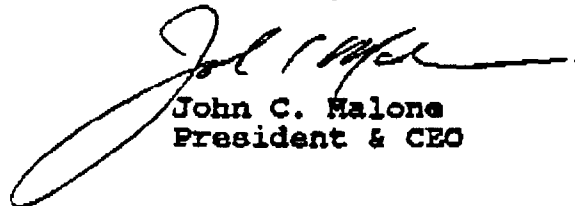
Dear Barry:

Congratulations on your "open letter" in Broadcasting magazine. Over the longer term, repeal of the compulsory license is probably inevitable, particularly if a "must carry" regime appears untenable.

We would be happy to participate in a study of transitioning into a free market. Our initial concerns are that the transition be lengthy enough to accommodate needed contractual changes among broadcasters and the production community, and that some accommodation be made for the relatively few cable customers in small rural systems. However, in the final analysis, the free market will be much fairer for all programming packagers - both broadcast and cable - and should create a level playing field for all.

Please let us know if further meetings are planned.

Sincerely,



John C. Malone
President & CEO

JCM/st

CERTIFICATE OF SERVICE

I, Jillian Wing, a legal secretary at the law firm of Hogan & Hartson, hereby certify that on this 19th day of December, 1991, I caused to be served by first-class mail, postage prepaid, a copy of **REPLY COMMENTS OF FOX BROADCASTING COMPANY** addressed to the following:

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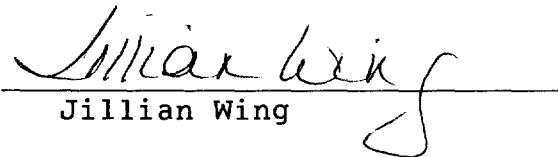
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